

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Review of the Commission's
Regulations Governing Broadcast
Television Advertising

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MM Docket No. 95-90

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REPLY COMMENTS OF MEDIA ACCESS PROJECT

Media Access Project ("MAP") respectfully submits these reply comments in the above referenced docket. The parties on both sides of this proceeding have submitted economic data and policy arguments concerning the networks' market power in the national advertising market and the degree of influence networks can exert over their affiliates. Yet in the their zeal to prove that repeal of the network control of station advertising rates rule ("rates rule") and the network advertising representation rule ("representation rule") will not harm the public interest, and especially the goals of diversity and licensee autonomy, some network commenters have misstated the nature of these goals.

The Commission should not be misled. It has repeatedly found that the public interest is best served when licenses are awarded to a diverse array of parties. MAP and others have shown that repeal of these rules would allow self-interested network reps to replace the independent advisory role played by advertising reps and could greatly diminish the revenues of affiliate stations. Therefore, repeal of the rules directly injures the Commission's diversity goals.

Parties supporting repeal have responded to these public interest concerns by shifting focus twice. Instead of looking at the effects of repeal on diversity of license ownership, CBS focuses on diversity of copyright ownership. Then, instead of examining the effects of repeal on the programming advice stations receive from independent reps, CBS and Capital Cities/ABC hope

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that networks will use their added power in a benign way. Both responses are unsatisfactory. The Commission has never looked at intellectual property to determine ownership diversity, and it has held that arrangements with even the *potential* to corrupt licensee autonomy are against the public interest.

In addition, MAP supports the proposal of Chris-Craft Industries, Inc., which urges exempting emerging networks from application of the rule.

I. IT IS ERRONEOUS TO ARGUE THAT REPEAL OF THE RULES WOULD NOT HAVE A DETRIMENTAL EFFECT ON DIVERSITY.

Network commenters have made some extraordinarily overbroad arguments concerning the Commission's fundamental public interest goal of promoting diversity. CBS argues, for example, that allowing networks to represent their affiliates will have little effect on program diversity. It questions a long-held notion that diversity interests are served by restricting a network's ability to force its affiliates to carry network programming. Comments of CBS Inc. at 21. "That assumption is fundamentally flawed," CBS continues, "since it fails to recognize that networks themselves acquire their programming from widely diverse sources." *Id.* Amazingly, citing the Commission's 1993 decision to repeal the Financial Interest and Syndication Rules as support, CBS claims that the only useful measure of source diversity is copyright ownership. *Id.*

This argument should not merit serious attention because it takes out of context the Commission's discussion of copyright ownership. The Commission stated that copyright ownership was useful, as compared to the number of executive producers, to measure concentra-

tion in the program production market.¹ *Financial Interest and Syndication Rules, Second Report and Order*, 8 FCC Rcd 3282, 3310-11 (1993), *recon. granted on other grounds*, 8 FCC Rcd 8270 (1993). Copyright ownership is wholly irrelevant as a measure of diversity of licensee ownership, and the Commission has never used it for that purpose.

The Supreme Court has confirmed that the Commission has broad power to ensure that licensees exercise editorial control to serve their local communities, and this is the proper basis for evaluating the public interest. *NBC v. United States*, 319 U.S. 190 (1943). Nowhere in that decision does the Court authorize the Commission to go beyond issues of licensee ownership and to look at copyright diversity. In summarizing the Commission's diversity goals, the Court has noted that "the Commission has long acted on the theory that diversification of mass media *ownership* serves the public interest by promoting diversity of program and service viewpoints." *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 780 (1978)(emphasis added). Ownership, not programming content, is the proper focus of diversity concerns because "ownership carries with it the power to select, to edit, and to choose the methods, manner, and emphasis of presentation." *Id.* at 785, *quoting Multiple Ownership of Standard, FM, and Television Broadcast Stations*, 50 FCC 2d 1046, 1050 (1975). The constitutional issues would be "wholly different" if the Commission were to choose among applicants on the basis of content or viewpoints instead of ownership. *Id.* at 801, *quoting NBC v. United States*, 319 U.S. at 226.

¹The same footnote cited by CBS as support for this proposition goes on to state that the Commission's ownership rules are applied without regard to management of the medium's content. 8 FCC Rcd at 3310, n. 66. This footnote, therefore, actually supports the proposition that ownership of copyright is irrelevant to diversity of ownership.

II. REPEAL OF THE REPRESENTATION RULE WILL DIMINISH THE AFFILIATES' ABILITY TO FULFILL THEIR OBLIGATIONS TO PROGRAM TO SERVE THEIR COMMUNITIES OF LICENSE.

CBS and Capital Cities/ABC also claim that repeal of the representation rule will not effect actual programming selection. Comments of Capital Cities/ABC, Inc. at 17; CBS Comments at 22. Although it concedes that repeal will deprive stations of independent programming advice, CBS claims that this is unimportant because "actual programming decisions are made by the stations themselves..." CBS Comments at 22.

But this argument misses the point. No party has argued that the networks will wrest final decisionmaking authority away from the stations. Instead, stations' capacity to make programming decisions will be decreased as a result of two factors. First, they will no longer be able to rely on their advertising rep for objective programming advice. Indeed, a network rep will be unlikely ever to advise the station to act contrary to network interests. Second, the networks will gain greater financial influence over the affiliates, which they can use to sway the stations' decisions.

Therefore, if it repeals the representation rule, the Commission would burden licensees' efforts to exercise programming autonomy. A licensee has a non-delegable duty to ensure that the station operates in the public interest. *See, e.g., NBC v. United States*, 319 U.S. 190 (1943). It has long been Commission policy that "[a] broadcast licensee must retain control of its facility. This control includes ascertaining the needs and interests of the listening public and formulating responsive programming." *Cosmopolitan Broadcasting Corp.*, 59 FCC 2d 558, 560 (1976); *En Banc Programming Inquiry*, 44 FCC 2303, 2311 (1960) ("foundation of the American system of broadcasting" is to place basic responsibility for all matter broadcasting the hands of the licensee).

See also NBC v. United States, 319 U.S. at 199 (regardless of programs that are actually aired, the "important consideration is that station licensees are denied freedom to choose"); *Fairness Report*, 48 FCC 2d 1, 10 (1974) (responsibility to offer programming concerning issues of public importance can neither be delegated nor restricted by contract).

As MAP and others have shown, networks have the ability, through either pointed advice or direct coercion, to prevent the affiliate from exercising independent programming autonomy in the local, public interest. MAP Comments at 5-6, 8-10; Comments of AFLAC Broadcasting Group at 7-8. Independent advertising reps, on the other hand, do not constrain licensee's programming autonomy - they are outside consultants with no coercive power. "[R]eps serve a critical, though little understood role as independent advisors to local stations on programming and business issues.... Stations value reps not only for their expertise but also for their independence..." Comments of Station Representatives Association at 9; Comments of CBS Television Network Affiliates Association and ABC Television Network Affiliates Association at 3-4.

The Commission need not determine whether networks would actually exercise this influence to find that licensee autonomy is inhibited. If repeal of the rule "could potentially inhibit" a licensee's ability to freely program to serve its community of license, it would run against the policies embedded in the Communications Act. In *Subscription Radio Agreements*, 56 FCC 2d 805 (1975), the Commission found that coercion need not be explicit or direct to constitute an infringement of licensee control. There, it considered whether music format service contracts "restrict[ed] programming flexibility and thereby amount[ed] to a contracted abdication by the licensee of its responsibility to the public and to the Commission." *Subscription Radio Agreements*, 56 FCC 2d at 807. It found that the contracts exerted a "subtle pressure" to prevent

local broadcasters from changing programming in the public interest, which need not be stated in the contract nor frequently utilized in actual practice. "[T]he 'restrictive provisions' [of the contracts,] be they suggestions, representations, or selection criteria, are contrary to the public interest if they *could potentially inhibit* licensee responsibility." *Id.* at 809 (emphasis added).

CBS argues that, in repealing its *Golden West* policy, the Commission placed emphasis on a station's ability to choose a different rep organization. *Golden West Repeal, Report and Order*, 87 FCC 2d 668, 680 (1981); CBS Comments at 20. It claims that if a station feels that the network representative has performed poorly as a programming advisor, the station "will always have the option of dismissing" it. CBS Comments at 23.

But the present case differs from the *Golden West Repeal*. In the *Golden West Repeal*, the station had the freedom to take its business elsewhere; it was not subject to abuses or coercion by the rep. In this case, however, the affiliate will not be able to shop around. It is highly optimistic to suggest that the affiliate, which depends on the network for programming to fill the most highly-viewed and lucrative part of its day, would not face retaliation or penalties, either direct or indirect, for such a move.²

CBS also argues that since network reps will receive a commission for sale of advertising, they will work to *increase* affiliate profits, not to compete for them. CBS Comments at 22-23. Similarly, NBC claims that networks would not compete for advertising dollars because they desire to be affiliated with the strongest possible stations. Comments of NBC, Inc. at 17-18.

²If the rule is repealed, the Commission should, in order to ensure that an affiliate would have the freedom to dismiss a network rep, promulgate regulations that prevent the affiliation agreement from containing a prohibition, penalty, or other retaliatory clause, and that prevent a network from otherwise acting in retaliation for failure to enlist its service as an advertising rep.

This argument defies common sense, especially in light of the inherent competition for national advertisers between the networks and affiliates. It is difficult to believe that networks would not choose their own profits over their good intentions towards their affiliates. Moreover, and in any event, the Communications Act is not concerned with profitability, but with service to the public, which requires autonomy in licensee programming.

A network usurping the programming functions of the licensee - even one that does so in a benign manner - is no substitute.

III. THE COMMISSION SHOULD NOT ENFORCE THE REPRESENTATION RULE AGAINST EMERGING NETWORKS SUCH AS UPN OR WB.

Chris-Craft Industries filed comments urging that "regardless of whether the Commission adopts a full repeal of [the representation rule]...it should eliminate the applicability of the rule to new networks such as UPN." Comments of Chris-Craft Industries, Inc. at 1. MAP generally supports this suggestion. By increasing the program alternatives available to viewers of free, over-the-air broadcast television, emerging broadcast networks such as UPN and WB promote the Commission's diversity goals and serve the public interest. The Commission should encourage the development of alternative modes of programming to the extent it is consistent with the public interest. In the case of the representation rule, exempting these emerging networks would help foster their development.

Moreover, for several reasons, there is less danger that these networks will behave in an anticompetitive manner in the absence of the rule. UPN and WB have fewer affiliates, Chris-Craft Comments at 2-3, and their programming is watched by fewer viewers. MAP Comments at 11-12. Therefore, they have virtually no ability to raise spot prices - time on other, competing media such as cable networks is more nearly a substitute. Similarly, UPN and WB will be less

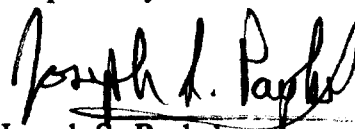
able to exercise coercive power over their affiliates because the programming they provide has lower ratings and syndicated programming may be a closer substitute.

However, MAP urges the Commission to define with care and specificity the limits of any exceptions it might make for these emerging networks and to monitor their progress closely. If and when they grow strong enough, either in terms of ratings or hours of programming per week, they, too, should become subject to the rule.

CONCLUSION

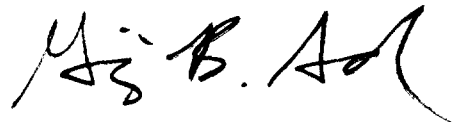
Repeal of these rules would not stand up to a correct assessment of the public interest goal of achieving maximum diversity of ownership of autonomous licensees. Instead of addressing these concerns, network commenters have merely tried to divert the issue. For this reason, the Commission should retain the rules in their current form, making an exception as necessary to promote the development of emerging networks such as UPN and WB.

Respectfully submitted,


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